

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN**

SIERRA CLUB,

Plaintiff,

V.

CITY OF HOLLAND and HOLLAND
BOARD OF PUBLIC WORKS,

Defendants.

Case No. 1:08-cv-1183
Hon. Paul L. Maloney

PLAINTIFF’S FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE APPLICABLE METHOD FOR CALCULATING EMISSION INCREASES FROM MODIFICATIONS MADE TO THE DE YOUNG PLANT AND THE BURDEN OF PROOF FOR DEFENDANTS’ “ROUTINE MAINTENANCE” DEFENSE

Plaintiff, Sierra Club, by its attorneys, moves pursuant to Fed. R. Civ. P. 56 for partial summary judgment finding as a matter of law that:

- (1) the City of Holland and Holland Board of Public Works (collectively, the “Defendants”) have the burden of production and persuasion to show the affirmative defense of routine maintenance, repair and replacement; and
- (2) the proper test for calculating emissions increases from certain projects at the James De Young power plant is the “actual-to-potential” test.

Resolution of these questions will affect the remaining issues in this case and will limit and simplify the issues for trial. It is expected that, regardless of the Court's decision regarding this motion, the parties will file additional summary judgment motions that will be informed, in part, by the Court's ruling on this motion. Pursuant to Local Civil Rule 7.1(d), Plaintiff has ascertained through discussions with Defendants that Defendants will oppose this Motion.

The grounds for this motion are set forth in the accompanying brief in support of its motion.

WHEREFORE, Sierra Club respectfully requests that the Court grant partial summary judgment ordering that Defendants have the burden of production and persuasion on the routine maintenance, repair and replacement exemption to the Clean Air Act Prevention of Significant Deterioration program and that the appropriate test to apply for calculating emission increases under the facts of this case is the actual-to-potential test.

Respectfully submitted on July 2, 2010.

McGILLIVRAY WESTERBERG & BENDER LLC

/s/ David C. Bender

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